

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DAVID DRONE,

Petitioner,

v.

FEDERAL BUREAU OF PRISONS,

Respondent.

No. 2:21-CV-0063-KJM-DMC-P

ORDER

Petitioner, a federal prisoner proceeding pro se, brings this petition for a writ of habeas corpus under 28 U.S.C. § 2241. The matter was referred to a United States Magistrate Judge as provided by Eastern District of California local rules.

On November 2, 2022, the Magistrate Judge filed findings and recommendations, which were served on the parties and which contained notice that the parties may file objections within the time specified therein. No objections to the findings and recommendations have been filed. The magistrate judge recommended dismissing plaintiff's action after the court warned plaintiff "that failure to oppose the [respondent's] motion [to dismiss] could be construed as consent to the relief requested" under Local Rule 230(c) and plaintiff did not file an opposition. F&R at 1, ECF No 8.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304, this court has conducted a *de novo* review of this case. Local Rule 230(c) states a "failure to file a timely opposition may be construed by the Court as a non-opposition to a motion" but does not

1 state a failure to respond may be construed as consent to the relief requested. E.D. Cal. L.R.
2 230(c). Courts may either dismiss complaints due to plaintiff's non-opposition or consider the
3 complaint's underlying merits regardless of the non-opposition. *Compare Ghazali v. Moran*,
4 46 F.3d 52, 54 (9th Cir. 1995) (dismissing case with prejudice due to plaintiff's non-opposition)
5 with *Elec. Recyclers Int'l, Inc. v. Calbag Metals Co.*, No. 1:14-CV-01352, 2015 WL 1529490, at
6 *2 (E.D. Cal. Apr. 2, 2015) ("Although Calbag's motion now faces no opposition, the court's
7 duty remains to consider its underlying merits.").

8 Here, this court has discretion to dismiss the case on a procedural basis due to plaintiff's
9 non-opposition. Moreover, this court has reviewed the merits of petitioner's petition for writ of
10 habeas corpus and finds defendant's motion to dismiss for failing to state a claim under 28 U.S.C.
11 § 2241 should be granted without prejudice. Petitioner's claims are not covered under 28 U.S.C.
12 § 2241, which exists to litigate claims of persons held in state custody in violation of the
13 Constitution of the United States.

14 Accordingly, IT IS HEREBY ORDERED:

- 15 1. The findings and recommendations filed November 2, 2022 (ECF No. 8), are
16 adopted in full;
- 17 2. Petitioner's writ of habeas corpus is dismissed without prejudice for failure to
18 state a claim under 28 U.S.C. § 2241; and
- 19 3. The Clerk of the Court is directed to close this case.

20 DATED: January 17, 2023.

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23 CHIEF UNITED STATES DISTRICT JUDGE
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